

A Constitutional Analysis of Grandparents' Custody Rights

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Grandparents occupy a unique position in both families and the broader community. They serve as repositories of tradition, as babysitters, or as parent surrogates where parents are unable or unwilling to care for their children. Despite the benefits that grandparent care offers, many state adoption statutes do not require preference or notice for grandparents in custody proceedings.¹ This imbalance in the statutory framework often puts grandparents at a disadvantage when competing against foster parents or state officials who wish to put the child into foster care.

Because adoption by strangers to the family severs the child's ties to his natural family, adoption proceedings may destroy grandparents' ability to interact with their grandchildren. Given the grave consequences of adoption outside the family for grandparent-grandchild relationships, this Comment argues that grandparents' recognized constitutional right to *participate* in their grandchildren's upbringing² also allows grandparents to *direct* that upbringing. Specifically, grandparents have a constitutional right to both preference and notice in custody proceedings. Although adoption ultimately turns on a determination of the child's best interests,³ a failure to notify grandparents adequately or to prefer their petitions, where doing so would not be contrary to the child's interests, ought to be regarded as a violation of the grandparents' right to due process.

In reaching this conclusion, the Comment first examines current state laws that illustrate a policy preference for grandparent or kinship

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¹ See notes 8–9. In contrast, some states offer foster parents a preference under certain circumstances. See, for example, Tenn Code Ann § 36-1-115(g)(1) (2001) (granting first preference in adoption proceedings to foster parents who have cared for a child for a year or more); Conn Gen Stat Ann § 52-466(f) (West 1991) (granting standing to foster parents, but not grandparents, to bring a writ of habeas corpus to return a child to their custody).

² See *Johnson v City of Cincinnati*, 310 F3d 484, 501 (6th Cir 2002) (holding that a grandmother with a prior history of active participation in her granddaughters' lives has a fundamental right to freely associate with and participate in the upbringing of her grandchildren); *Drollinger v Milligan*, 552 F2d 1220, 1227 (7th Cir 1977) (holding that a grandfather has a fundamental right to participate in caring for his granddaughter).

³ See *Quilloin v Walcott*, 434 US 246, 255 (1978) (“[T]he State was required in this situation to find . . . that the adoption . . . [was] in the ‘best interests of the child.’”).

care, and yet contain few concrete safeguards for grandparents' interests in the custody context. Part I also addresses the basis for asserting that the grandparent-grandchild relationship is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. Part II analyzes potential obstacles to finding a protected liberty interest for grandparents and shows that the recent case of *Troxel v Granville*⁴ does not pose a threat to grandparents' rights in the custody context. In *Troxel*, the Court struck down a statute that allowed grandparents and others to obtain court-ordered visitation where a parent denied access to the child.⁵ The Court's core reason for striking down the statute in that case, however, was that the statute ignored the traditional presumption that fit parents will act in the child's best interests and required parents to demonstrate that the visitation would be contrary to the child's interests.⁶ Custody proceedings typically are predicated on the termination of parental rights; where parents are no longer in the picture, *Troxel* need not serve as a constraint on grandparental rights.

Part III discusses the possible bases for claiming that, in the absence of parents and subject to the child's best interests, grandparents have a fundamental liberty interest in maintaining familial integrity and the right to shape their grandchild's upbringing. This Part examines other instances in which custody and parental rights have been afforded due process protection and draws an analogy between the rights of grandparents and those of unwed fathers. Finally, the Comment examines the consequences of recognizing such a liberty interest for grandparents, and the procedural and substantive safeguards that could ensure its protection.

I. GRANDPARENTS' CUSTODY RIGHTS UNDER CURRENT LAW

A. The Statutory Background

Many state statutes contain a preference for grants of custody to those who would likely have the closest emotional ties to the child.⁷ This

⁴ 530 US 57 (2000).

⁵ *Id.* at 67 (holding that a Washington statute allowing the court to grant visitation orders to any person, including grandparents, unconstitutionally infringed on parents' rights to control the upbringing of their children).

⁶ *Id.* at 69.

⁷ See Jill Duerr Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care*, in Naomi R. Cahn and Joan Heifetz Hollinger, eds, *Families by Law: An Adoption Reader* 111-12 (NYU 2004) (describing the trend towards placement within the family and the rapid growth of kinship foster care nationwide). Some examples of state statutes illustrating this preference towards kinship foster care include: Ark Code Ann § 9-9-102(a) (Michie 2002) (pro-

policy preference, however, seldom gives grandparents the same procedural guarantees as those that parents enjoy in custody proceedings.⁸ Generally, state law does not require petitioners for adoption to notify grandparents of adoption proceedings, nor does it require grandparents' consent.⁹ Courts may even deny grandparents the right to intervene in parental rights termination proceedings, potentially allowing the state to take custody of the child without affording the grandparents an opportunity to express their preferences or offer an alternative home for the child.¹⁰ This result appears particularly harsh in light

viding that in foster care placements, "preferential consideration shall be given to an adult relative over a nonrelated caregiver"); NJ Stat Ann § 30:4C-12.1a (West 1997) ("In any case in which the Division of Youth and Family Services accepts a child in its care or custody . . . the division shall initiate a search for relatives who may be willing and able to provide the care and support required by the child."); 10 Okla Stat Ann § 7210A (West 1998) (requiring that child-placing agencies "make special efforts to recruit foster placement for children in their custody from suitable relatives and kin of the child"); Va Code Ann § 16.1-283 (Michie 2004) (providing that after termination of parental rights, "the court shall give a consideration to granting custody to relatives of the child, including grandparents.").

⁸ See Roberta Kotkin, Note, *Grandparents Versus the State: A Constitutional Right to Custody*, 13 Hofstra L Rev 375 (1985), for a discussion of the heavy procedural burden placed on grandparents under New York law, which denies grandparents a preferential status in custody determinations. See also *Navajo Nation v Superior Court*, 47 F Supp 2d 1233, 1238 (ED Wash 1999) (describing the notice provisions in the Indian Child Welfare Act as requiring notice only to the parent, Indian custodian, or tribe for involuntary parental rights termination proceedings); *Gonzalez v State Department of Children's Services*, 136 SW3d 613, 618–19 (Tenn 2004) ("In the majority of cases, [] grandparents are not allowed to intervene in [parental rights] termination cases . . . because they are deemed to have no interest in the outcome of the proceedings."); *Graham v Children's Services Division*, 39 Or App 27, 591 P2d 375, 379 (1979) (holding that grandparents, who previously had custody of their grandchildren, did not have an interest sufficient to entitle them to an adversarial hearing before the agency could withhold its consent to the grandparents' adoption of their grandchildren). Compare these cases with *Stanley v Illinois*, 405 US 645, 657–58 (1972), which held that the Due Process Clause of the Fourteenth Amendment requires the state to give a natural parent a hearing on his parental fitness before the state may take his child into custody.

⁹ See, for example, *In re Adoption of Watson*, 45 Hawaii 69, 361 P2d 1054, 1056, 1060 (1961) (holding that a grandfather was not entitled to notice of adoption, was not entitled to be made party to the adoption, and did not have standing to appeal the adoption decree). See also *Gordon v Lowell*, 95 F Supp 2d 264, 271 (ED Pa 2000) (holding that grandparents lacked standing to petition for custody because Pennsylvania law only confers standing if the child has resided with his grandparents for twelve months or more); *Navajo Nation*, 47 F Supp 2d at 1238 (stating that the Indian Child Welfare Act does not require notice to grandparents in involuntary parental rights termination proceedings).

¹⁰ Kristen Jones Indermark, Note, *Permissive Intervention—Grandparents' Key to Entering Adoption Proceedings*, 26 Ga L Rev 787, 788 n 6, 819 n 124 (1992) (providing examples of situations in which courts dismissed grandparents' petitions to intervene in adoption proceedings on the grounds that they had no legal interest in their relationship with the child). See also *Gonzalez*, 136 SW3d at 618–19 (stating that courts often deny grandparents a right to intervene in termination cases because grandparents' interest in the proceedings is either adequately secured by the parents' attorney or the grandparents have no cognizable interest in the outcome); *Kasper v Nordfelt*, 815 P2d 747, 749 (Utah App 1991) (denying grandparents' intervention petition be-

of the fact that adoption can mean the end of the grandparents' relationship with the child.¹¹ Several courts, condemning these results, have required notice to grandparents of adoption hearings because of their interest in the proceedings.¹²

Once the child has been removed from his family, his grandparents' ability to petition for his adoption can be significantly inhibited by a lack of notice of custody proceedings, competing adoption petitions, or any sort of deference to the parent-like roles and obligations that grandparents often assume. Despite evidence of a policy preference in many states for kinship care over foster care,¹³ grandparents still may be at a disadvantage in adoption competitions with foster parents. By explicitly preferring foster parents and strangers to the family, as at least one state does,¹⁴ and by failing to require notice or a hearing for

cause they had no legally cognizable interest in the child of their deceased son); *Department of Human Resources v Ledbetter*, 153 Ga App 416, 265 SE2d 337, 339 (1980) (denying the right to intervene to a great-aunt and great-uncle, who acted as grandparents to the child, because they did not possess a legal interest in their relationship with the child).

¹¹ Some state statutes extinguish the rights of grandparents to visit their grandchildren if a nonrelative adopts the child. See, for example, Minn Stat Ann § 257.008(5) (West 2003). See also *Gordon*, 95 F Supp 2d at 270 (noting that Pennsylvania law extinguishes any visitation rights of grandparents once a child is adopted); *In re Adoption of Tompkins*, 341 Ark 949, 20 SW3d 385, 387 (2000) (noting that an adoption by foster parents would extinguish court-ordered grandparent visitation rights).

¹² See *In re Adoption of I.K.E.W.*, 724 NE2d 245, 250–51 (Ind App 2000) (holding that although the grandparents had no due process rights with respect to the adoption of their grandchild, they were entitled to notice of the hearing on the foster parents' petition to adopt). Missouri law grants grandparents a statutory right to intervene in certain custody proceedings. See Mo Rev Stat § 211.177.1 ("A grandparent shall have the right to intervene in any proceeding . . . in which the custody of a grandchild is in issue."); *In re M.B.*, 91 SW3d 122, 125 (Mo App 2002) (noting that grandparents may intervene unless the court decides that intervention is "against the best interest of the child"). This law, however, does not guarantee grandparents a right to initiate a custody proceeding of their own. See *Whisman v Rinehart*, 119 F3d 1303, 1313 (8th Cir 1997). The limits of the rights guaranteed under the Missouri statute are further illustrated by *In re Adoption of H.M.C.*, 11 SW3d 81, 90 (Mo App 2000) (holding that, in custody proceedings where the state's intervention statute did not apply, a grandparent's biological relationship to the child was insufficient to constitute the necessary "interest" to require intervention under the rules of civil procedure).

¹³ See note 7.

¹⁴ Tennessee disfavors adoption by relatives once the child has entered foster care by allowing a preference for foster parent adoption when the child has resided with the foster parents for twelve months or more. See Tenn Code Ann § 36-1-115(g)(1) (2001). Additionally, the same statute restricts relative adoptions to those relatives that fulfill specific residency requirements. Tenn Code Ann § 36-1-115(d) (2001). Connecticut has similarly conferred standing on foster parents to seek return of a child to their custody by a writ of habeas corpus, Conn Gen Stat Ann § 52-466, while denying standing to grandparents in *In re Kristy L.*, 47 Conn Supp 273, 787 A2d 679, 685–87 (Super Ct 1999). See also Cal Family Code § 3040(a)(2) (West 2004) (stating that in custody disputes preference should be given to any person "in whose home the child has been living in a wholesome and stable environment" if not to the parents).

grandparents, adoption and custody statutes may unduly interfere with any rights grandparents may have to direct the upbringing of their grandchildren. The next Part discusses whether the Constitution entitles grandparents to such rights.

B. Bases for Grandparents' Constitutional Rights

The Due Process Clause of the Fourteenth Amendment provides a promising basis for the assertion of greater rights for grandparents in the custody context.¹⁵ Although there is no fundamental "right to adopt,"¹⁶ grandparents, much like parents, may have a fundamental liberty interest in familial integrity and the companionship of their grandchildren. Part I.B.1 analyzes the bases on which the courts have found constitutional protection for family matters, and the ways in which those theories can extend to grandparents. This Part addresses how grandparents may stand in the shoes of parents, and how the law has recognized the similarities between the grandparent-grandchild and parent-child relationships.

Part I.B.2 addresses possible obstacles facing the extension of established fundamental rights in the context of the nuclear family to the situation of grandparents. *Troxel's* reaffirmation of parental autonomy as a fundamental liberty interest, at the expense of grandparents' visitation rights, is one such obstacle. A careful analysis of the differences between the visitation and adoption contexts reveals, however, that grandparents can receive preference and notice in adoption proceedings without infringing on parents' rights. Where parents' rights have been terminated, as is necessary for adoption, the conflict between the interests of grandparents and parents is absent.

1. Freedom of intimate association.

To assert constitutional protection for the grandparent-grandchild relationship, grandparents must demonstrate that their relationships are so intimate and essential that they fall within the Fourteenth

¹⁵ For a similar discussion of this issue prior to recent developments in the case law, see Kotkin, Note, 13 Hofstra L Rev 375 (cited in note 8).

¹⁶ See *Lofton v Department of Children & Family Services*, 358 F3d 804, 811–12 (11th Cir 2004) (stating that there is no fundamental right to adopt in holding that a state may constitutionally prohibit adoption by homosexuals), cert denied, 125 S Ct 869 (2005), citing *Mullins v Oregon*, 57 F3d 789, 794 (9th Cir 1995); *Lindley v Sullivan*, 889 F2d 124, 131 (7th Cir 1989). See also *Griffith v Johnston*, 899 F2d 1427, 1437 (5th Cir 1990) ("[W]e cannot recognize a 'fundamental right' to adopt a child.").

Amendment's protection of "liberty."¹⁷ One promising argument for this protection is that the grandparent-grandchild relationship is protected by the "freedom of intimate association." Unlike the freedom of expressive association protected by the First Amendment, the freedom of intimate association has been recognized as an unenumerated right grounded in the Due Process Clause.¹⁸ This right protects relationships that play an important role in our culture by transmitting values and serving as a "buffer" between the state and the individual.¹⁹ "Freedom of intimate association" protects a variety of personal bonds, such as the right to marry²⁰ and the right to determine family living arrangements.²¹ These emotional bonds are generally of great value to individuals and to society. Protection of these bonds from state interference allows individuals to define their own identities—perhaps the fundamental meaning of "liberty."²²

Courts consider many factors when assessing whether a relationship falls under the right to freedom of intimate association. These factors include the existence of a deep emotional attachment, shared experiences and beliefs, and other intangible factors that set the individuals sharing the relationship apart from the rest of the community.²³ Biology is of minor importance. Deep emotional attachments tend to follow from common biological ties due to a greater chance of prox-

¹⁷ See *Board of Regents of State Colleges v. Roth*, 408 US 564, 571 (1972) (examining the "nature of the interest at stake" to determine if it is a protected liberty interest subject to due process requirements) (emphasis added).

¹⁸ See *Roberts v. United States Jaycees*, 468 US 609, 618–19 (1984) (describing the rationale for constitutional protection of intimate relationships).

¹⁹ See *id.*

²⁰ See *Zablocki v. Redhail*, 434 US 374, 384–86 (1978) (noting that the right to marry is protected by the right of privacy).

²¹ See *Moore v. City of East Cleveland*, 431 US 494, 503–06 (1977) (Powell) (plurality) (finding that a city cannot force families to live in "narrowly defined [] patterns").

²² See *Lehr v. Robertson*, 463 US 248, 258 (1983) (explaining that a "relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection"). See also *Quilloin v. Walcott*, 434 US 246, 255 (1978) (recognizing protection of parent-child relationships and its basis in the emotional ties characterizing them); *Smith v. Organization of Foster Families for Equality and Reform*, 431 US 816, 844 (1977) (recognizing the importance of the emotional bonds cementing familial relationships); *Cleveland Board of Education v. LaFleur*, 414 US 632, 639–40 (1974) (recognizing the protection of "freedom of personal choice in matters of marriage and family life"); *Stanley v. Illinois*, 405 US 645, 651–52 (1972) (emphasizing the fundamental nature of a father's interest in caring for his children).

²³ See *Roberts*, 468 US at 619–20 ("Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares . . . distinctively personal aspects of one's life.").

imity or familiarity, but the emotional rather than the biological aspect of the relationship is the basis of the protection.²⁴

2. The right to parental autonomy.

Although related to the freedom of intimate association, another line of cases has established that parents have a right to exclusive control over decisions pertaining to their children. Parent-child relationships enjoy extensive protection from state interference in matters ranging from the child's education²⁵ to choice of religion.²⁶ Courts regard these rights as "far more precious" than the property rights generally protected by due process.²⁷ Parental rights directly influence parents' ability to control the child's values and prepare her for future involvement in society.²⁸ Although courts have repeatedly reaffirmed parents' virtually unfettered authority over their children, parents' substantive rights to custody and control may be subordinate to the state's interest in the child's welfare in cases of abuse or neglect.²⁹ In this way the "best interests of the child" can override parents' right to autonomy in making decisions regarding their children.³⁰

²⁴ See *Smith*, 431 US at 844 ("No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship.").

²⁵ See *Meyer v Nebraska*, 262 US 390, 400 (1923) (holding that a teacher's "right [] to teach and the right of parents to engage him so to instruct their children . . . are within the liberty of the [Fourteenth] Amendment."). See also *Pierce v Society of Sisters*, 268 US 510, 534–35 (1925) (invalidating a state statute that unreasonably interfered with parents' liberty to direct their children's education and upbringing).

²⁶ See *Wisconsin v Yoder*, 406 US 205, 213–14 (1972) ("[T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.").

²⁷ *May v Anderson*, 345 US 528, 533 (1953).

²⁸ See *Prince v Massachusetts*, 321 US 158, 166 (1944) (finding that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder"). The Supreme Court recently reaffirmed parents' freedom to determine the upbringing of their children by invalidating a statute allowing grandparents and others to receive court ordered visitation rights without the parents' consent. *Troxel*, 530 US at 67–69.

²⁹ See note 3. See also *In re Adoption of Child by P.*, 114 NJ Super 584, 277 A2d 566, 570 (1971) ("Although initially a natural parent has the right to custody, that right is secondary to the concern of the State . . . in promoting the child's welfare and best interests.").

³⁰ See, for example, *In re Adoption of Willow*, 433 Mass 636, 745 NE2d 330, 342 (2001) (explaining that the state did not infringe on a parent's constitutional rights by acting in its *parens patriae* capacity to sever the parent-child relationship when severance was in the child's best interests).

3. Extension of rights to grandparents.

The interests of grandparents in their relationships with their grandchildren bear many similarities to those of parents. Grandparents and parents generally share similar feelings of love and responsibility for the child, and grandparents often assist parents in caring for the child. These similarities demonstrate that the interests of grandparents deserve protection under the Due Process Clause as both important personal relationships and as an extension of parental autonomy rights.

The Supreme Court is generally reluctant to expand the range of unenumerated rights protected by the Due Process Clause;³¹ however, the extension of rights to grandparents is not a radical departure from prior Supreme Court precedent. In certain situations, courts have recognized rights for grandparents under the freedom of intimate association, but the division between intimate association rights and rights implicating parental autonomy often blurs. Both areas rest on similar bases and traditions.³² In light of this, one could potentially interpret the cases as implicitly recognizing parent-like autonomy where grandparents have assumed parent-like roles. This would allow grandparents to rely on the cases recognizing due process rights for unwed fathers,³³ making the argument for protection of parent-like grandparents less an expansion of substantive due process and more a revision of the concept of "parents" in light of tradition and practice.³⁴

The Supreme Court has expressed a willingness to extend some of the constitutional protection of the nuclear family to grandparent-grandchild relationships. In *Moore v City of East Cleveland*,³⁵ the Court implicitly recognized that grandparents can occupy a position much like that of parents, making their actions and wishes for their grandchildren equally deserving of respect in the absence of parental contest. The Court held that a local government could not impose a zoning ordinance that restricted a grandmother's ability to live legally with her grandchildren, recognizing that the grandmother had the right to determine the composition of her household.³⁶ In doing so, the

³¹ See generally *Washington v Glucksberg*, 521 US 702 (1997); *Moore*, 431 US at 502 (acknowledging the risks of expanding the scope of substantive due process without the guidance of more specific constitutional provisions).

³² See Parts I.B.1–2.

³³ See Part III.

³⁴ See note 122 for an explanation of the importance placed on tradition in finding protected liberty interests under the substantive due process doctrine.

³⁵ 431 US 494 (1977).

³⁶ *Id.* at 503–04 (Powell) (plurality).

Court reiterated its longstanding protection of the nuclear family, further stating that the "tradition of . . . grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."³⁷ The Court further implied that the right to live with grandchildren, undisturbed by state authority, is a natural corollary to the right of family members to inculcate values, which itself serves as one of the cornerstones for the protection of parental autonomy.³⁸

Several cases appear to cite *Moore* for the proposition that the right of grandparents to live with their grandchildren is a fundamental liberty interest of the same nature and type as that enjoyed by parents. Most recently, in *Johnson v City of Cincinnati*,³⁹ the Sixth Circuit invalidated an exclusion notice that prohibited a grandmother who had been convicted of marijuana trafficking from entering the locality where her grandchildren resided, despite her established caregiving relationship with them.⁴⁰ Although the grandmother in *Johnson* did not live with her grandchildren,⁴¹ making her relationship with them slightly less intimate than the relationship in *Moore*, the court deemed her role in their lives equally worthy of constitutional protection. The court described this right to participate in grandchild upbringing in the language of freedom of intimate association, declaring that "a family member's right to participate in child rearing and education is one of the most basic and important associational rights protected by the constitution."⁴² This decision expanded upon *Moore*, characterizing the right as not a mere right to organize one's household and family living arrangements as one sees fit, but as a fundamental right to participate in the upbringing of grandchildren with whom grandparents have an existing relationship (absent parental contest).⁴³ The court determined that "nothing in our tradition or precedent can credibly be read to suggest that the right to participate in child rearing does not extend to

³⁷ *Id.*

³⁸ See *id.* (discussing the principle of constitutional protection of the "sanctity of the family," including grandparents and other relatives, because of its deep roots in history and tradition and its key role in passing down moral and cultural values).

³⁹ 310 F3d 484 (6th Cir 2002).

⁴⁰ *Id.* at 506.

⁴¹ *Id.* at 489.

⁴² *Id.* at 499. See also *Drollinger v Milligan*, 552 F2d 1220, 1227 (7th Cir 1977) ("This basic interest in the integrity of the family unit has been afforded the protection of due process of law.").

⁴³ *Johnson*, 310 F3d at 500-01 (finding that the grandmother had actively participated in the lives of her grandchildren and holding that she had "a fundamental freedom of association right to participate in the upbringing of her grandchildren").

grandparents.”⁴⁴ In this way, the court recognized that the constitutional rights afforded to the family are not limited to the nuclear family, but may extend to those who perform parent-like functions.⁴⁵

Grandparents’ interest in maintaining relationships with, and participating in the upbringing of, their grandchildren has generally been well-received by courts in the absence of a conflicting parental interest.⁴⁶ It seems natural to extend the holdings of these cases to afford protection to grandparents wishing to *direct* the upbringing of their grandchildren by adoption. A grandparent’s rights may be qualified by a fit parent’s own exclusive control over his child, but where a parent is absent or has no objection to the grandparent-grandchild relationship, a grandparent should enjoy protections and presumptions similar to those given to parents.

In summary, both the intimate aspects of grandparents’ relationships with their grandchildren and their traditional status as parent surrogates provide substantial bases for finding that the interest of grandparents in maintaining relationships with their grandchildren is a protected liberty interest within the meaning of the Due Process Clause. As *Moore* and other cases indicate, there is little reason to restrict these rights to the nuclear family. From here, it is a short step to finding that, in the absence of parents, due process entitles grandparents to a presumption of fitness and standing to obtain custody, which parents already enjoy. As the next Part illustrates, however, there is some resistance to taking this next step.

II. CHALLENGES FOR GRANDPARENTS SEEKING EXTENSION OF RIGHTS

The presumption of parental autonomy provides a useful construct for finding due process protection for grandparent-grandchild relationships where the grandparents fulfill parent-like roles. It also serves, however, as a limitation on the ability of grandparents to assert rights where the parents’ rights have not yet been terminated due to the almost absolute deference given to the decisions of fit parents. Part II.A discusses the reluctance of some courts to extend the sub-

⁴⁴ *Id* at 500, citing *Moore*, 431 US at 504.

⁴⁵ *Johnson*, 310 F3d at 500. See also *Drollinger*, 552 F2d at 1227 n 6 (“The nuclear family has traditionally constituted the unit afforded the protection of due process. We see no reason, however, not to extend this guaranty to the grandfather-grandchild relationship.”).

⁴⁶ See *Moore*, 431 US at 506; *Johnson*, 310 F3d at 506; *Drollinger*, 552 F2d at 1227 (holding that the conditions of a parent’s probation order unconstitutionally interfered with a grandfather’s right to care for his granddaughter). But see *Troxel*, 530 US at 67.

stantive due process rights of the family to grandparents seeking custody of their grandchildren. Part II.B addresses the specific problem of parental autonomy in further detail.

A. Failures in the Custody Context

Several courts have balked at the idea that grandparent-grandchild relationships should enjoy any constitutional protection in custody proceedings.⁴⁷ They decline to extend *Moore* to cover other threats to grandparent-grandchild relationships because they interpret the line of cases beginning with *Meyer v Nebraska*⁴⁸ as guaranteeing only parents' rights.⁴⁹ The dissenting opinions of Justices Stewart and White in *Moore* foreshadow the arguments that are generally posed in opposition to finding a protected liberty interest in grandparents' relationships with their grandchildren. Justice Stewart argued that the interest "in permanently sharing a single kitchen and a suite of contiguous rooms with some of her relatives simply does not rise" to the level of a personal interest "implicit in the concept of ordered liberty."⁵⁰ Similarly, Justice White stated that the desire to live with more than one set of grandchildren "is hardly one of which it could be said that 'neither liberty nor justice could exist if [it] were sacrificed.'"⁵¹ However, neither of these dissenting opinions closes the door to constitutional protection for grandparents' rights in the custody context. Arguably, the desire to direct the upbringing of one's grandchildren is of significantly more importance and personal worth than the interest in sharing an address.

Despite the room for recognition of grandparents' custody rights under substantive due process left by even the dissenting opinions in *Moore*, several courts—most noticeably the Ninth Circuit—have declined to extend the recognition of fundamental rights to grandpar-

⁴⁷ See *Mullins v Oregon*, 57 F3d 789, 797 (9th Cir 1995) ("[G]randparents *qua* grandparents have no constitutionally protected liberty interest in the adoption of their children's offspring."); *Gordon v Lowell*, 95 F Supp 2d 264, 269 (ED Pa 2000) (limiting due process protection to parents); *In re Adoption of Tompkins*, 341 Ark 949, 20 SW3d 385, 387 (2000) (rejecting a constitutionally protected right to custody, adoption, or visitation for grandparents, concluding that at common law grandparents had no such presumptive rights and so any rights for grandparents must derive from statutes). But see *Wilson v Family Service Division*, 554 P2d 227, 230–31 (Utah 1976) (holding that a grandmother had a vested interest in the custody and welfare of her grandchild, entitling her to a hearing on her adoption petition before the agency placed the child for adoption).

⁴⁸ 262 US 390 (1923).

⁴⁹ See text accompanying notes 25–30.

⁵⁰ *Moore*, 431 US at 537 (Stewart dissenting).

⁵¹ *Id* at 549 (White dissenting), quoting *Palko v Connecticut*, 302 US 319, 326 (1937).

ents. In *Mullins v Oregon*,⁵² the Ninth Circuit determined that, although grandparents may have a right to freedom from state interference in their existing relationships with their grandchildren, they have no right to create a new family unit “out of whole cloth.”⁵³ Because the Mullinses had only minimal contact with their grandchild prior to filing their adoption petition and essentially based their right to preference solely on their biological connection, the court found that their relationship did not warrant constitutional protection.⁵⁴

In *Miller v California*,⁵⁵ the Ninth Circuit narrowed the window for the application of parental rights protections even further, effectively closing the gap left by *Mullins* for grandparents who enjoyed something beyond mere biological ties. The court determined that grandparents who had “de facto” parent status under state law and who acted as the child’s primary caregiver for a substantial period of time had no protected liberty interest in the care of their grandchild.⁵⁶ The court gave the Millers no constitutional protection against a decision to restrict their visitation rights while their grandchildren were in the care of child protective services. The broadness of the court’s language suggests an unwillingness to extend the constitutional protection of parents’ custody of children beyond existing family units and traditional parent-child bonds in *any* context.⁵⁷ The court based this conclusion in substantial part, however, on the fact that the children’s mother objected to the grandparents’ visitation, distinguishing it from *Moore*.⁵⁸ It seems quite possible, therefore, that in cases where there is no conflict between the wishes of the parents and the grandparents, the interests of grandparents could qualify for due process protection.

In an approach similar to that taken by many states, an Indiana court conceded that grandparents may enjoy some constitutional rights with respect to their grandchildren, but determined that rights of grandparents “derive” from the rights of the parents, and so these

⁵² 57 F3d 789 (9th Cir 1995).

⁵³ Id at 794.

⁵⁴ Id (“We have found no other authority supporting the proposition that a grandparent, by virtue of genetic link alone, enjoys a fundamental liberty interest in the adoption of her grandchildren.”) (emphasis added).

⁵⁵ 355 F3d 1172 (9th Cir 2004).

⁵⁶ Id at 1175 (discussing California’s “de facto parent” rule and declining to hold that this established a constitutionally protected liberty interest in the rearing of children).

⁵⁷ Id at 1175 (“While there is no question that *parents* have a constitutionally protected liberty interest in making decisions about the care, custody, and control of their children, we have never held that any such right extends to *grandparents*.”) (internal citations omitted).

⁵⁸ See id at 1176 (distinguishing *Moore* on the grounds that the Millers’ interests in this case conflicted with the interests of the children’s mother).

rights were effectively terminated with the termination of parents' own rights.⁵⁹ However, the independent emotional bond between grandparents and grandchildren is often regarded as an independent interest in other contexts.⁶⁰ The termination of parents' rights due to unfitness or abandonment does not always result in the termination of all rights of the grandparents, as kinship foster care preference and grandparent visitation statutes indicate.⁶¹

B. The Problem of Parental Autonomy

Cases such as *Mullins* and *Miller* demonstrate the obstacles facing grandparents' claims for constitutional protection of their interest in assuming responsibility for their grandchildren. This Part will describe the ways in which the overriding protection of parental autonomy may make courts wary of extending grandparents' rights.⁶² Several cases imply that, because of the strict deference to parental autonomy, only those grandparents who do not attempt to usurp parental author-

⁵⁹ See *In re Adoption of I.K.E.W.*, 724 NE2d 245, 249 & n 6 (Ind App 2000) (recognizing that grandparents may have a liberty interest in the grandparent-grandchild relationship when the relationship is essentially a custodial one, but stating that this interest does not exist in the adoption context because the derivative rights of grandparents are extinguished by the termination of the parents' rights). See also Indermark, Note, 26 Ga L Rev at 820–23 (cited in note 10) (describing the doctrine of derivative rights).

⁶⁰ See, for example, *Moore*, 431 US at 504–05 (Powell) (plurality); *Johnson*, 310 F3d at 499–500; *Drollinger*, 552 F2d at 1227.

⁶¹ See note 7. The importance of statutory evidence of national policy trends in substantive due process cases was recently reaffirmed by the Supreme Court in *Lawrence v Texas*, 539 US 558 (2003). As part of its analysis, the Court examined the number of states with similar laws to illustrate changes since *Bowers v Hardwick*, 478 US 1039 (1986), stating that “[t]he 25 States with laws prohibiting the conduct referenced in *Bowers* are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.” *Lawrence*, 539 US at 559. In addition to statutory evidence of a desire to grant grandparents some rights that are not derivative of the parents' rights, the common law of several states indicates that grandparents' rights may survive the termination of the parents' rights. See Indermark, Note, 26 Ga L Rev at 788 n 5 (cited in note 10), citing *Stevens v Shannon*, 107 Pa Super 557, 164 A 352, 353–54 (1933) (holding that the right to custody of minor grandchildren is corollary to the grandparent's duty to maintain grandchildren if orphaned); *Michelson v Superior Court*, 41 Wash 2d 718, 251 P2d 603, 604–05 (1952) (naming a grandparent the “natural guardian” of her grandchild when the child's parents have died or have had their parental rights terminated). But see, for example, *In re Kristy L.*, 47 Conn Supp 273, 787 A2d 679, 685–87 (Super Ct 1999) (holding that grandparents did not have standing to petition for custody of their grandchild since parental rights had been terminated); *Suster v Arkansas Department of Human Services*, 314 Ark 92, 858 SW2d 122, 124 (1993) (“Because a grandparent's rights are only derivative, they . . . are subject to divestment when parental rights are terminated.”) (internal quotation marks omitted).

⁶² See, for example, *Suster*, 858 SW2d at 124. In denying a grandmother's right to intervene in her granddaughter's adoption proceeding, the court stated, “To create new, [independently] enforceable rights in grandparents could . . . [cause] prospective adoptive parents [to] be less inclined to assume that worthwhile role.” *Id.*

ity could ever receive priority in adoption proceedings.⁶³ Any conclusion that grandparents have a constitutional right to direct the upbringing of their grandchildren therefore must be tempered by parental autonomy concerns. In custody contexts, typically the parents' rights already have been terminated, and so the concern is less acute. There is evidence, however, that parents' wishes for the child may still receive some weight when the child is in state custody.⁶⁴

The recent Supreme Court decision in *Troxel* reaffirmed the importance of parental autonomy interests. In that case, a statute allowing anyone to petition for visitation rights was deemed an unconstitutional interference with the rights of the child's parent to direct her child's upbringing.⁶⁵ Although the grandparents in *Troxel* had enjoyed a substantial relationship with the child in the past, a termination of their visitation rights was held not to violate any constitutional right of the grandparents.⁶⁶

Troxel does not end all inquiry into the question of whether grandparents enjoy a fundamental liberty interest in the society and custody of their grandchildren. First, visitation poses very different risks than custody. Visitation may potentially interfere with the parents' plan for their child's upbringing by leading to the contradiction of the parents' wishes or the transmission of confusing messages to the child. However, where adoption is at issue, the parent-child relationship has been terminated, so the replacement of the parent with a grandparent leads to no additional disruption in the child's life.

Troxel also did not address the possibility that grandparents might possess a fundamental interest in their grandchildren that does not con-

⁶³ See, for example, *Ellis v Hamilton*, 669 F2d 510, 513 (7th Cir 1982) (stating that where grandchildren are in their parents' custody, grandparents probably do not have a liberty interest in the society of their grandchildren); *Navajo Nation v Superior Court*, 47 F Supp 2d 1233, 1239–40 (ED Wash 1999) (holding that, where parents had voluntarily arranged for the adoption of their child, the child's grandparents had no fundamental right to adopt). See also *Troxel*, 530 US at 68; *In re Parentage of C.A.M.A. v Appel*, 154 Wash 2d 52, 109 P3d 405, 413 (2005) (invalidating a statute that gave grandparents the benefit of a presumption that visitation was in a child's best interest because this presumption infringed on a fit parent's due process rights, and holding that a showing of harm to the child from a failure to grant visitation was necessary). But see *Harrold v Collier*, 2005 Ohio LEXIS 2241, *22 (upholding Ohio's nonparental visitation statute as applied to a case where the grandparents demonstrated that visitation would be in the child's best interests and the parent's contrary wishes were just one, albeit weighty, factor in the court's best interests analysis).

⁶⁴ See *Miller*, 355 F3d at 1176 (holding that grandparents did not have a protected liberty interest in visiting grandchildren in state custody where the agency and the parent agreed that visitation should cease).

⁶⁵ *Troxel*, 530 US at 67–69.

⁶⁶ *Id.* at 69.

flict with the parents' wishes, or that the grandparent might effectively stand in the shoes of the parent through an established caregiving relationship with the parent's consent. Instead, *Troxel* stands for the much more limited proposition that where grandparents' or others' wishes conflict with the wishes of the parent, the court must defer to the parent.⁶⁷ The holding in *Troxel* might realistically inhibit the ability of individual grandparents to form substantial relationships with their grandchildren, but it does not preclude the finding of an interest in those who are permitted access.

Where there is no suggestion that the parents of the child object to the visitation, and the grandparents have a history of involvement in the child's upbringing, the courts have been willing to invalidate state and local laws that interfere with those relationships.⁶⁸ Due process protection for a grandparent's right to adopt her grandchildren can be limited to situations where it would not compete with parental rights.⁶⁹ As shown in this Part, there are some obstacles to grandparents' assertion of a protected liberty interest in their relationships with their grandchildren. The cases involving unwed fathers suggest, however, that these concerns are not insurmountable.

III. RELATIONSHIP CHARACTERISTICS NECESSARY FOR DUE PROCESS PROTECTION

This Part proposes a test for cases involving grandparents similar to that applied to determine whether the interests of unwed biological fathers deserve due process protection. The cases involving unwed fathers' custody claims illustrate the narrow construction of parental identity for due process protection in the context of child custody, and

⁶⁷ Id at 68–69 (“So long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family.”). But see *Harrold*, 2005 Ohio LEXIS 2241 at *20–21 (stating that, despite the *Troxel* presumption that fit parents act in their children's best interests, “the trial court's analysis of the best interests of the child need not end once a parent has articulated his or her wishes”).

⁶⁸ See, for example, the post-*Troxel* case of *Johnson*, 310 F3d at 505–06, which held unconstitutional a city ordinance that prohibited a drug offender grandmother from entering the area where the mother lived, inhibiting the grandmother's ability to participate in the upbringing of her grandchildren.

⁶⁹ For an example of the way that substantive due process rights can be flexibly applied within groups of people, see *Michael H. v. Gerald D.*, 491 US 110, 127 (1989) (holding that the biological father of a child born outside of wedlock does not have a fundamental liberty interest in visitation rights where finding such an interest would result in the disruption of an existing family unit).

the careful weighing of interests that the analysis involves.⁷⁰ This narrow construction of parental identity in custody contexts does not necessarily exclude grandparents. Instead, in the absence of parents, grandparents may have intimate bonds with the children and fill roles equally deserving of parental autonomy as those protected in the context of the nuclear family. This is particularly true if the grandparents have a substantial relationship with the child, and if they assumed some degree of responsibility for the child prior to filing an adoption petition.⁷¹

Part III.A analyzes the importance of biology in the determination of parental due process rights and the trend towards de-emphasis of the biological relationship. Part III.B discusses how the existence of a substantial relationship with the child has become of determinative importance in parental custody contexts and the ways in which that same analysis can apply to grandparents. Finally, Part III.C addresses competing interests in the custody context in an attempt to address concerns that recognizing greater rights for grandparents could lead to a ballooning of substantive due process protection for others⁷² or could discourage other potential adoptive parents.

A. Biology

Relationships between grandparents and grandchildren often originate with a biological connection. As *Lehr v Robertson*⁷³ holds, however, biology is not enough to entitle a relationship to constitutional protection.⁷⁴ The reasons behind the established constitutional protection for family matters illustrate why this conclusion is necessary. The family is entitled to freedom from state interference not as a means of protecting mere ties of blood, but rather because it preserves emo-

⁷⁰ See, for example, *Stanley v Illinois*, 405 US 645, 657–58 (1972) (holding that the Due Process Clause prohibits a presumption that an unwed father is per se “unfit,” and that the father must be afforded a hearing on fitness before his children are taken by the state).

⁷¹ See *Smith v Organization of Foster Families for Equality and Reform*, 431 US 816, 842–47 (1977) (comparing the foster family to the natural family to address whether foster parents possess a protected liberty interest in their relationships with their foster children).

⁷² In the similar context of grandparents’ visitation rights, the Supreme Court accepts a similar argument. *Troxel*, 530 US at 67–69 (noting that under the Washington statute, “[a]ny person may petition the court for visitation rights at any time,” and the court may grant such visitation rights whenever ‘visitation may serve the best interest of the child’”).

⁷³ 463 US 248 (1983).

⁷⁴ See *id.* at 261–62.

tional attachments and fosters education that prepares children for future involvement in society.⁷⁵

Courts considering grandparents' adoption rights recognize this general purpose behind substantive due process protection for family matters and emphasize that biological links alone do not create a relationship that warrants constitutional protection.⁷⁶ Instead, the importance of biology is that it tends to afford grandparents an opportunity to develop a close relationship with their grandchildren.⁷⁷ As the courts implicitly concede, biological links often serve as an inaccurate proxy for the closeness of relationships, and step-grandparents or adoptive grandparents may enjoy relationships equally, or perhaps more, deserving of protection than those enjoyed by the natural grandparents of the child.⁷⁸

B. Substantial Relationship

As the unwed father cases and *Mullins* conclude, a biological relationship does not, in itself, demonstrate the existence of a fundamental liberty interest protected under the Due Process Clause.⁷⁹ "[T]he

⁷⁵ See *Smith*, 431 US at 844 ("[T]he importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association."); *Wisconsin v Yoder*, 406 US 205, 231–33 (1972) ("The duty to prepare the child for 'additional obligations' . . . must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship.").

⁷⁶ See *Mullins*, 57 F3d at 794–95 (holding that where the biological grandparents seeking adoption had only minimal contact with the child, a state action blocking their adoption did not violate their substantive due process rights); *Navajo Nation v Superior Court*, 47 F Supp 2d 1233, 1241 (ED Wash 1999) (rejecting the claim that grandparents, by virtue of biology alone, enjoy a fundamental liberty interest in the adoption of their grandchildren). See also *In re Adoption of H.M.C.*, 11 SW3d 81, 90 (Mo App 2000) ("[A] biological relationship to [a] child, by itself, does not constitute the necessary 'interest' under [the rules of civil procedure] to require intervention.").

⁷⁷ This idea follows from *Lehr*:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.

463 US at 262.

⁷⁸ See *id* (emphasizing that the significance of the biological connection between a natural father and his offspring is that it offers him an opportunity to develop a relationship with his offspring). See also *Michael H. v Gerald D.*, 491 US 110, 129 (1989) (Scalia) (plurality) (explaining that where a child is born into a marital family, the natural father's opportunity to pursue a relationship with his child is no longer unique, and the state may prefer the relationship of the husband over that of the biological father).

⁷⁹ *Lehr*, 463 US at 261 (holding that a mere biological link is insufficient to afford a father's relationship with his child constitutional protection, but where an unwed father participates in

importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children," rather than through the mere fact of natural parenthood.⁸⁰ Evidence of a substantial relationship between grandparents and grandchildren thus provides a more promising basis for recognizing substantive due process protection for a particular family tie than does the biological link alone. A substantial relationship implies that emotional attachments have developed and that the grandparents have had some involvement in the child's upbringing, which together appear to meet the general purposes of the constitutional protection for familial bonds as illustrated by the unwed fathers cases.

Cases such as *Stanley v Illinois*⁸¹ show the greater status conferred on biological fathers with a demonstrated history of involvement in the lives of their children as compared with cases where the claim to preservation of the relationship rests on biology alone.⁸² In cases where the natural father had maintained a substantial relationship with his children, the courts have deemed state interference with that relationship unconstitutional.⁸³ The only exceptions to this general consensus have arisen where another substantial relationship of equal significance in the child's life exists and state law favors that other relationship.⁸⁴ In *Michael H. v Gerald D.*,⁸⁵ the Court found the interest

the rearing of his child, "his interest in personal contact with his child acquires substantial protection under the Due Process Clause"). See also *Caban v Mohammed*, 441 US 380, 414 (1979) ("[I]f and when one develops, the relationship between a father and his natural child is entitled to protection against arbitrary state action as a matter of due process.") (Stevens dissenting).

⁸⁰ *Smith*, 431 US at 844 (internal quotation marks omitted).

⁸¹ 405 US 645, 651 (1972) ("The private interest here, that of a man in the children he has sired *and raised*, undeniably warrants deference and, absent a powerful countervailing interest, protection.") (emphasis added).

⁸² See *Lehr*, 463 US at 257-58 (emphasizing the linkage between parental duty and parental right); *Quilloin v Walcott*, 434 US 246, 256 (1978) (holding that the adoption of a child by the mother's new husband over the father's objections did not violate the father's Due Process rights where he never legitimated or visited the child prior to the filing of the adoption petition).

⁸³ See *Caban*, 441 US at 394 (invalidating a statute requiring the mother's consent when an unwed father with a substantial relationship wishes his partner to adopt his children, with no similar requirement when the mother's partner wishes to adopt); *Stanley*, 405 US at 658 (holding that the state cannot constitutionally presume unfit a biological father and caregiver). But see *Michael H.*, 491 US at 130 (holding against a biological father when the mother's husband was regarded as the child's father since birth because a state legitimacy presumption favored the husband and both putative fathers had a substantial relationship with the child).

⁸⁴ See *Michael H.*, 491 US at 130. Although the *Michael H.* plurality deemphasized the due process threads running through cases such as *Stanley* and *Caban*, five justices refused to foreclose the possibility that a natural father might have a constitutionally protected interest in his relationship with a child whose mother is married to someone else at the child's birth. Four

of the biological father less important than that of the husband of the child's mother, who had acted as, and had been legally presumed to be, the child's father since birth.⁸⁶ Absent such potential for extreme disruption of the child's accustomed family life, "the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection."⁸⁷

Grandparents and unwed fathers occupy similar positions in a child's life. Given this similarity, the cases determining that unwed fathers who have a substantial relationship with their children have a protected liberty interest in maintaining that relationship support a finding that grandparents have a constitutionally protected interest in adopting grandchildren with whom they have a substantial relationship. Such a conclusion draws further support from grandparents' success in other contexts.⁸⁸ Courts have determined that grandparents may not be deprived of their freedom to associate with and participate in the upbringing of their grandchildren. These decisions bear particular promise for a similar constitutional protection of the greater right to direct the child's upbringing through adoption. For example, in *Summers v Wulffenstein*,⁸⁹ the Utah Supreme Court determined that where parental rights had been terminated, a grandparent had a liberty interest in the custody and welfare of her grandchildren for the purposes of due process analysis.⁹⁰ In *Ellis v Hamilton*,⁹¹ the Seventh Circuit provided further indication of courts' receptiveness to due process protection for grandparents' adoption rights in the context of a substantial relationship. The case implied that the state's action in taking the child out of the care of her grandmother, without first allowing her to adopt the child, could have violated due process had the state not provided reasonable remedies.⁹²

justices further agreed that a natural father with a substantial relationship has a liberty interest in his relationship with his child.

⁸⁵ 491 US 110 (1989).

⁸⁶ *Id.* at 129 (holding that where "the child is born into an extant marital family, the natural father's unique opportunity [to develop a relationship with the child] conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter").

⁸⁷ *Lehr*, 463 US at 258, citing *Moore*, 431 US 494.

⁸⁸ See *Moore*, 431 US at 498–99; *Johnson*, 310 F3d at 501; *Drollinger*, 552 F2d at 1226–27.

⁸⁹ 616 P2d 608 (Utah 1980).

⁹⁰ *Id.* at 610 (characterizing the grandparent's "'dormant or inchoate right or interest in the custody and welfare' of [the] children" as a liberty interest).

⁹¹ 669 F2d 510 (7th Cir 1982).

⁹² *Id.* at 513 ("[W]e are reluctant to conclude that a great-aunt, an adoptive grandmother, and a de facto mother and father all rolled up into one does not have a liberty interest sufficiently like that of a parent."). Cases where preexisting participation in the child's life is evident

One might argue that the existence of a substantial relationship alone sufficiently ensures the protection of grandparents' interests without any need for reference to the Constitution. If grandparents have such a relationship with their grandchildren, then they will naturally know of any actions affecting that relationship before they occur. Foster care, however, often disrupts grandparents' relationships with their grandchildren, and foster relationships may enjoy statutory preference over grandparental relationships. The fact that the grandparents' relationship can be taken into account during a best interests of the child inquiry matters little if grandparents are unaware that any custody actions are taking place, or if they lack any hope of success due to a preference scheme disfavoring them.

C. Competing Adoption Interests

Courts have been wary of accepting arguments for quasi-parental due process rights asserted by grandparents. Several courts insist that extending protection to grandparents would require the extension of constitutional protection to other relatives. This extension, the courts find, would result in an ever-expanding number of competing adoption petitions and would unduly inhibit the search for permanent, nurturing homes for children.⁹³ This Part addresses both of these concerns by analyzing the ways in which grandparents' interests differ from those of other relatives and foster parents.

1. Competition between grandparents and other relatives.

There are some indications that grandparents' rights should be viewed as superior to other relational interests. Statutes conferring privileges specifically on grandparents, such as court-ordered visitation,⁹⁴ intervention rights in certain custody proceedings,⁹⁵ and, in at

also partially dispel the fear that an extension of due process protection to grandparents would bestow a right "to create an entirely new family unit out of whole cloth." *Mullins*, 57 F3d at 794 (holding that the "negative right to be free of governmental interference in an already existing family relationship" does not apply to biological grandparents who had only minimal prior contact with the child they sought to adopt).

⁹³ See *Mullins*, 57 F3d at 796 (stating that the creation of rights in grandparents would burden the process of placing children). See also *id.* at n 62.

⁹⁴ See, for example, Tex Family Code Ann § 153.433 (West 2002) (granting grandparents reasonable access to a grandchild when one of the parents is absent or unfit and at least one natural parent still has parental rights); 755 ILCS 5/11-7.1(a) (West 1998) (stating that the court "shall" grant grandparents visitation rights when the parents of the child are deceased, but restricting visitation orders for other relatives to the court's discretion).

⁹⁵ See Mo Rev Stat § 211.177.1 (granting grandparents the right to intervene in custody proceedings unless the judge determines such intervention is not in the best interest of the child).

least one state, limited preference in custody proceedings,⁹⁶ indicate that legislators in several states assume that grandparent-grandchild relationships are distinct from aunt-niece, cousin-cousin, or other relationships with relatives.⁹⁷

Cases such as *Moore* and *Johnson* also provide evidence of this recognition of the traditionally important role that grandparents have occupied in the family and distinguish them from other relatives.⁹⁸ Both law and tradition treat grandparents' interests in their grandchildren as more important than the interests of other relatives or interested parties. Grandparents tend to perceive themselves as playing unique roles in the lives of their grandchildren.⁹⁹ For example, many grandparents derive meaning from their roles as imparters of wisdom and indulgent parent-like figures.¹⁰⁰ Grandparents also often value grandparenthood as a means of "life review."¹⁰¹ Similarly, grandchildren tend to view their grandparents as distinct from other relatives.¹⁰² Grandparents may take on various roles in children's minds—as a conduit for tradition and learning, or as a sort of magical and respected elder.¹⁰³ Most importantly, grandchildren often view the grandparent as a sort of higher level parent, providing a supportive safety net and fulfilling a similar nurturing role.¹⁰⁴ Children deprived of these relationships often feel less emotional security and a weaker cultural and historical

⁹⁶ See RI Gen Laws § 15-7-5(b)(2) (2003) (conferring a preference on "the natural parents of the child and his or her spouse or one of the grandparents of the child").

⁹⁷ But see note 7 for statutes that provide a more general preference for care by relatives of the child.

⁹⁸ See *Moore*, 431 US at 504 ("Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally . . . deserving of constitutional recognition.") (emphasis added); *Johnson*, 310 F3d at 500 (explaining that the right to participate in the upbringing of one's grandchild occupies a high position in society's "hierarchy of values" and is of a more fundamental nature than the right to visit one's nieces and nephews).

⁹⁹ See Crystal C. Ramirez Barranti, *The Grandparent/Grandchild Relationship: Family Resource in an Era of Voluntary Bond*, 34 Fam Rel 343, 344-45 (1985), citing H.Q. Kivnick, *Grandparenthood: An Overview of Meaning and Mental Health*, 22 Gerontologist 59, 59 (1982) (discussing the dimensions of grandparenthood).

¹⁰⁰ Barranti, 34 Fam Rel at 344-45 (cited in note 99).

¹⁰¹ *Id.*

¹⁰² *Id.* at 348, citing A. Kornhaber and K.L. Woodward, *Grandparents/Grandchildren: The Vital Connection* (Anchor 1981) (discussing the "modes of attachment which existed between grandchildren and grandparents").

¹⁰³ Barranti, 34 Fam Rel at 348 (cited in note 99).

¹⁰⁴ *Id.*

identity.¹⁰⁵ These findings do not show that children may not develop similar significant relationships with other relatives. Constitutional protection of grandparent-grandchild relationships, however, need not be denied merely because it could logically extend to other potentially worthy familial relationships.

2. Competition between grandparents and foster parents.

Grandparents are traditionally regarded as occupying a place immediately below parents in the family hierarchy with respect to children.¹⁰⁶ When people outside the family, such as foster parents, act in a parental role, it is less clear that grandparents with a substantial relationship with the child will still enjoy the highest priority in adoption proceedings. Some states' adoption statutes grant foster parents preference while according no such preference to relatives of the child.¹⁰⁷ Furthermore, because courts have placed little emphasis on biology in determining the rights of unwed fathers, it seems they should also often subordinate grandparents' rights to those of foster parents by denying any constitutional protection for the grandparent-grandchild relationship.

There is support, however for the idea that kinship is important, insofar as it creates differing expectations of insulation and protection from state interference. Foster parents are creatures of state law and are essentially contracted caregivers.¹⁰⁸ Where a claimed interest "derives from a knowingly assumed contractual relation with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties."¹⁰⁹ In other words, unless state law contains provisions explicitly preferring foster parents over others in adoption proceedings, foster parents cannot argue that they have been deprived of a fundamental liberty interest when the state interferes with or dismantles the foster family.¹¹⁰ The nature of the foster parent-child relationship thus gives foster parents no protected liberty interest in the custody of their foster children.¹¹¹ Since the grandparent-grandchild

¹⁰⁵ See *id.* at 346–48 (discussing the consequences of a nonexistent grandparent/grandchild relationship).

¹⁰⁶ See *Johnson*, 310 F3d at 500.

¹⁰⁷ See note 14.

¹⁰⁸ See *Smith*, 431 US at 845 (contrasting the foster family and the natural family).

¹⁰⁹ *Id.* at 845–46.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 846 ("[T]he limited recognition accorded to the foster family by the [state] statutes and the contracts executed by the foster parents argued against any but the most limited constitutional 'liberty' in the foster family.").

relationship is not a creature of state law, there is no reason to assume that grandparents should be similarly constrained. Grandparents also have a superior claim to unrelated foster parents because, historically, the Supreme Court's family and parental rights holdings have involved biological families.¹¹²

Despite foster parents' lack of a fundamental liberty interest in the families they contract to create, foster parents' adoption petitions often succeed over those of grandparents. These cases could indicate that grandparents never possess a fundamental liberty interest in the right to direct the upbringing of their grandchildren. A deeper reading reveals that these cases tend to occur in contexts where the grandparents either have a weak relationship with the child,¹¹³ or where the best interests of the child indicate that the foster parents would provide a more suitable home, particularly where the child has lived with the foster family for some time or where other family members are the reason for the child's removal.¹¹⁴

IV. SUGGESTED SOLUTIONS TO ENSURE PROTECTION OF GRANDPARENTS' CUSTODY INTERESTS

Grandparents often assume traditional parental roles with the parents' explicit or implicit consent. For example, grandparents frequently act as babysitters, or grandparents may take grandchildren into their homes when parents are not able to provide adequate care.¹¹⁵ In cases where grandparents have formed these relationships with their grandchildren, they deserve protection from state interference, as required by the Due Process Clause. This Part suggests the form that protection for grandparents' substantive rights should take.

¹¹² See *Lofton v Department of Children and Family Services*, 358 F3d 804, 812 (11th Cir 2004) (noting that the Supreme Court's opinions have often stressed that the usual understanding of "family" implies a biological relationship).

¹¹³ See *In re Adoption of I.K.E.W.*, 724 NE2d 245, 249 (Ind App 2000) (explaining that a liberty interest only exists where the grandparent-grandchild relationship is essentially a custodial one).

¹¹⁴ See *In re Adoption of C.D.*, 313 Ill App 3d 301, 729 NE2d 553, 556, 558–59, 563 (2000) (holding that the lower court's finding in the foster parents' favor was not an abuse of discretion and did not violate the grandparents' due process rights where the grandparents had limited contact with the child and the child's uncle had previously subjected her to abuse).

¹¹⁵ According to recent United States Census figures, 5.8 million grandparents, or 3.6 percent of the population over age thirty, live with grandchildren under age eighteen. Of these grandparents, 42 percent serve as the primary caregivers for their grandchildren. United States Census Bureau, *Grandparents Living with Grandchildren: 2000* 1 (2003), online at <http://www.census.gov/prod/2003pubs/c2kbr-31.pdf> (visited Aug 8, 2005).

A. Notice

If a grandparent's interest in adoption falls under the protection of the Due Process Clause, that protection warrants a requirement to notify grandparents whenever adoption petitions or custody orders contrary to their interests are filed.¹¹⁶ This notice requirement could be limited to situations where the child is no longer in the parents' care and where the grandparents appear to have established a substantial relationship with the child. Courts could easily ascertain the existence of such a relationship by a brief interview with the child, or by an inquiry into the circumstances of the parental rights termination. Much as the notification and consent of unwed fathers generally is required,¹¹⁷ grandparents who have assumed responsibility for the child in the past should be entitled to notification of custody proceedings. As some statutes do with unwed fathers,¹¹⁸ this notice requirement can be waived to avoid unduly hampering the foster care and adoption process if the grandparents and the child have no evident recent or ongoing ties.¹¹⁹

B. Preference

More significantly, due process would also require that grandparents' adoption petitions receive preferential consideration where grandparents can demonstrate the necessary relationship criteria. First, the preference would ensure that grandparents have standing to object to foster care orders that are contrary to their interests. Second, the preference could require the court to weigh more heavily grandparents' interests in caring for the child over the alternative of putting the child into foster care.

¹¹⁶ For an analysis of grandparents' procedural due process rights under *Mathews v Eldridge*, 424 US 319 (1976), see Kotkin, Note, 13 Hofstra L Rev at 388-405 (cited in note 8).

¹¹⁷ See note 83.

¹¹⁸ See RI Gen Laws § 15-7-5(b)(2) (allowing adoption without consent of the noncustodial parent on a showing of failure to pay child support or similar factors); NY Dom Rel Law § 111.2 (McKinney 1999) (maintaining that consent of an unwed father is necessary if he has had "substantial and continuous or repeated contact with the child"); Cal Fam Code § 8604 (2005) (stating that both birth parents have the right of consent unless one fails to maintain contact and pay child support).

¹¹⁹ As stated in *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314-15 (1950), the notice required for the satisfaction of procedural due process is "notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied." *Id.* A similar rule of reason can be applied in this case by examining whether petitioners made all reasonable efforts to ascertain if a grandparent with a substantial relationship to the child existed.

Such a pre-foster care preference would avert many conflicts between grandparents and foster parents, while minimizing disruption in the child's life. This preference would also protect grandparents' significant liberty interest in the companionship of their grandchildren and the power to direct their upbringing in the absence of parents. The preference could also enhance grandparents' abilities to petition for visitation if their grandchildren are placed in foster care. Currently, grandparents' interests are at their most vulnerable once the child is placed with strangers to the family.¹²⁰ If, however, courts recognize a constitutionally protected liberty interest in grandparent-grandchild relationships, grandparents will be guaranteed standing and their petitions will bear more weight in custody and visitation disputes.

Preference in custody proceedings would not guarantee that grandparents will prevail in every case in which they assert an interest. Rather, the best interests of the child analysis would continue to serve as a restriction on grandparents' rights, just as the best interests of the child can now override parents' rights in cases of neglect or abuse. Instead, the proposed adoption preference for grandparents would merely establish a rebuttable presumption of their fitness as adoptive parents and custodians.

This proposed preference may seem like a small step for grandparents' rights, for it says nothing about how a court must weigh their interests after the child has entered into foster care for an extended period of time. The preference, however, can avert substantial dislocation for the child by ensuring that grandparents have access to the courts before the child enters foster care. Situations in which state law restricts grandparents' access to their grandchildren in foster care, and the uncertain fate of grandparents' interests in an adoption competition with foster parents, illustrate the need for a pre-foster care preference as a matter of constitutional right. State statutes and policies that prefer grandparents or kinship foster care further support the preferential approach.¹²¹ The existence of this pattern among the states illustrates the traditional importance placed on kinship care arrangements, and more generally on grandparent-grandchild relationships. The Supreme Court has emphasized such legislative evidence in its recent cases, which indicates a greater chance of success for recogni-

¹²⁰ See, for example, *Miller*, 355 F3d at 1176 (holding that grandparents had no substantive due process right to visit their grandchildren in state care, nor did their status as "de facto parents" under California state law give them any more than the right to appear in the dependency proceeding).

¹²¹ See note 7.

tion of grandparents' rights in spite of the Court's general reluctance to expand the scope of substantive due process.¹²²

C. Impact of Notice and Preference Requirements

Although due process protection of grandparents' adoption rights provides no guarantees that grandparents' custody petitions will always be successful, the protection would ensure that grandparents—whom many cases, statutes, and traditions regard as uniquely important in a child's life—are not separated from their grandchildren by state action without good reason and adequate deliberation. The protection applies in a narrow set of circumstances, preventing the severance of existing relationships and family units rather than automatically deferring to grandparents simply because of their position in the family tree.

CONCLUSION

The Supreme Court has long emphasized the essential importance and constitutional protection of the right to direct the upbringing of children.¹²³ These cases have generally defined this right in terms of the parent-child relationship; however, there are significant indications that it can apply equally to grandparents when they assume a similar role in inculcating values and providing for the child's physical and emotional needs. The autonomy rights of parents strictly circumscribe the scope of any right grandparents possess. In situations where the parents are unavailable or unfit, however, and grandparents have previously enjoyed a role in the child's life, state action should not interfere with that relationship unless its continuance is contrary to the child's best interests.

Grandparents, traditionally regarded as second-level parents and often charged with the care of grandchildren, deserve notice and preference in custody proceedings concerning their grandchildren, if they have assumed a parent-like role in the child's life. Statutes that fail to prefer kinship or grandparent care over foster care, or that fail to re-

¹²² See *Lawrence v Texas*, 539 US 558, 559–60 (2003) (invalidating a Texas statute criminalizing homosexual sodomy and stating that “our laws and traditions of the past half century . . . show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives”); *Washington v Glucksberg*, 521 US 702, 728 (1997) (“The history of the law’s treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted ‘right’ . . . is not a fundamental liberty interest.”). See also *Moore*, 431 US at 503 (“[T]he Constitution protects the sanctity of the family precisely because [it] is deeply rooted in this Nation’s history and tradition.”).

¹²³ See notes 25–28 and accompanying text.

quire foster parents to notify grandparents of an intention to adopt, unconstitutionally curtail this right. Unless the overarching requirements of the best interests of the child dictate otherwise, these grandparents' interests should enjoy preference in an evaluation of competing petitions for adoption by strangers to the family.

The recognition of a fundamental liberty interest in the custody and care of grandchildren does not preclude the success of all other potentially qualified candidates in adoption proceedings. It merely ensures that states will give grandparents with substantial relationships with their grandchildren a sufficient opportunity to voice their desire to adopt and to have their important familial ties and family-specific benefits adequately considered.

